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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Petitioner,

v.

CITY OF BOULDER, COLORADO,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a Boulder City Ordinance, adopted pursuant to Colorado's unique constitutional home rule powers and imposing a 90-day moratorium on cable T.V. construction by the City's permittee, immune from antitrust attack as a governmental act?

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COMMUNITY COMMUNICATIONS COMPANY, INC.,
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CITY OF BOULDER, COLORADO,
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Boulder, Colorado, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

This case arises from governmental acts taken by the elected City Council of Boulder, Colorado, to promote competition and diversity in the cable television market in Boulder. Specifically at issue are City Ordinance Nos. 4472 and 4473[1], unanimously adopted by Boulder's nine-member City Council on December 18, 1979, which imposed a 90-day moratorium on new cable T.V. construction within the City limits by Petitioner,

[1] Reprinted in the Appendix to the Petition ("App. Pet.") at A-55 to A-65.

Community Communications Company, Inc. ("CCC"), pursuant to its City permit.[2]

Respondent is a "home rule" city under Article XX, Section 6 of the Colorado Constitution (App. Pet. at A-47 to A-49), which confers on the City "the full right of self-government in both local and municipal matters." In 1964, the City Council issued a permit with a term of 20 years to construct and operate a cable T.V. plant in Boulder. The permit was nonexclusive and, as required by Article II, Section 11 of the Colorado Constitution, revocable at any time at the will of the City Council. CCC purchased this permit, subject to its terms, in 1966. Until the spring of 1979, CCC's entire operation in Boulder consisted of the retransmission of certain Denver, Colorado and Cheyenne, Wyoming television signals to an area of the City that had historically experienced poor T.V. reception. CCC always has been the only cable T.V. operator in Boulder and, despite the City's efforts to induce competition, continues to enjoy a *de facto* monopoly.

In the spring of 1979, CCC announced plans to begin expansion of its system. (Boulder Ex. K).[3] At

[2] Petitioner CCC is a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"). TCI's 1978 Annual Report showed cable T.V. revenues of $55.5 million. TCI's General Manager, J. C. Sparkman, has testified that TCI has over 900,000 subscribers and is the third largest cable T.V. operator in the United States. *See* Sparkman, March 4 Tr. 112-13. Testimony at the hearing on the motion for preliminary injunction is referred to by the witness name, the date, and the page of the hearing transcript (*e.g.*, "Sparkman, March 4 Tr. _____" refers to the transcript for March 4, 1980); deposition testimony is referred to by witness name and page of deposition transcript (*e.g.*, "Westdyke Dep. _____"); and hearing exhibits are referred to as "TCI Ex. _____" or "Boulder Ex. _____."

[3] Contrary to CCC's suggestions, the City Council never made a "favorable response" to CCC's expansion plans. (Petition at 2 and

about the same time, Boulder Communications Company ("BCC"), co-defendant below, requested a permit to build a cable system in Boulder. In July 1979, prompted by these developments, the City Council launched a five-month study of the cable T.V. situation in Boulder.

The Council's study focused on means of achieving competition and, at study sessions held during the following months, there were repeated expressions of concern about the tendency of cable T.V. systems to become monopolies and about the advantage CCC enjoyed over prospective competitors because it was already in place in the City, had a substantial headstart in "wiring," and had already taken steps to expand.[4] The City Council feared that these factors would effec-

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2 n.1). On May 25, 1979, Richard Varnes, the Director of Media and Programming of the Boulder Public Library, wrote to CCC's local manager to express his appreciation for the announced plans to connect the library studio with the cable system and with the prospects of "distant signals" being added. (Boulder Ex. L).

[4] *See, e.g.*, Boulder Ex. X (transcript of July 31, 1979 City Council meeting) at 13-15, 19, 22-24, 37-38, 41-43; Boulder Ex. Y (transcript of November 29, 1979 City Council meeting) at 20-21, 26-30; Boulder Ex. Z (transcript of December 4, 1979 City Council meeting) at 5-6, 11, 16, 23-25.

CCC's suggestion that the City's cable T.V. consultant, Robert Sample, told the City Council that cable T.V. is not a monopoly and that competition is possible (Petition at 3 and 3 n.2) is a gross misstatement of record facts. In his comments at the City Council's July 31, 1979 meeting, Mr. Sample reiterated his belief that cable T.V. is a "natural monopoly," particularly in cities that have existing cable operators:

> Those communities that now have one franchise, now automatically have a natural monopoly. There is no possibility after a city is built for another operator to come in. . . . Economically, once you get one company all over town, I think it would be very, very difficult for another operator to come in. Nobody has proven that [it is possible] yet.

tively preclude the entry of additional cable T.V. operators into the Boulder market. (*E.g.*, Westdyke, March 4 Tr. 20, 96, 100).[5] During the course of the study, it became clear that the City could not achieve competition simply by issuing another permit. (*Id.* at 19).[6] Potential competitors would not enter the Boulder cable T.V. market while CCC was completing its system. (*Id.* at 35).

(Boulder Ex. X at 23). The language quoted by CCC is part of a sentence from Mr. Sample's discussion of the impact that changing technology and economics may have on competition in cable T.V.:

> *But we may be entering into a period where* if there are a couple of franchise holders, they may overbuild each other and compete for services. *I can't tell you right now if that's going to happen or not. It is going to be interesting to see.*

(*Id.* at 24). The italicized language was deleted in the selective quotation offered by CCC.

[5] During the fall, while the City Council was deliberating, CCC accelerated its construction schedule to capture more of the market before competitors could successfully enter. (Westdyke, March 4 Tr. 37). Richard Varnes testified in District Court that the president of CCC's parent company (TCI) told him on December 1, 1979, that the City's efforts to open competition "might make [CCC] build a little faster. . . . They would like to be the only show in town." (Varnes, March 6 Tr. 22).

[6] CCC correctly notes (Petition at 3) that the City had the legal authority to grant another non-exclusive permit to BCC. For the reasons stated in the text, however, the City Council was convinced that granting a permit would not bring competition to the Boulder cable market. Moreover, in late November, 1979, BCC told the Council that no cable operator would propose a system for Boulder so long as CCC continued to expand and suggested that CCC's permit be revoked and the most qualified applicant be selected to build a system in the City. (TCI Ex. 14). The record is also clear that the Council preferred not to deal with only one potential entrant and instead sought the broadest possible competition. (*See, e.g.*, Boulder Ex. X at 33).

Finally, on December 18, 1979, the City Council voted to impose a 90-day moratorium on cable T.V. construction.[7] The purpose of the moratorium was temporarily to halt CCC's wiring of Boulder so that the City could solicit proposals from other cable T.V. operators to compete with CCC. The City Council believed that so long as CCC continued to build its system, any efforts to attract prospective competitors would be futile. Subsequent events proved this belief to be well-founded.[8]

The First Injunction. On January 15, 1980, CCC announced that it would defy the City's moratorium and continue stringing cable in the City's rights-of-way.[9] On the same day, CCC brought this action in the federal District Court in Denver, seeking damages and injunctive

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[7] The Council rejected a staff recommendation that a six-month moratorium be imposed. (Boulder Ex. A-1 at 12).

[8] Shortly after adopting the moratorium Ordinances, the City began its attempts to induce competitors to come into the Boulder cable T.V. market. On January 11, 1980 the City mailed draft applications for cable permits to over 50 cable operators in the United States. (Westdyke, March 4 Tr. 43). The City also placed advertisements in the *Wall Street Journal.* (Varnes, March 6 Tr. 20). Only three cable operators (other than CCC) responded to the City's solicitation. Each of the three operators, including BCC, indicated, subsequent to filing its proposal, that it would not enter the market if CCC proceeded to "wire" the entire City. Their positions are a matter of record in the trial court and before the Tenth Circuit on the appeal still before that court in this action. (*See* 12-13, *infra*). (Boulder Ex. I-2d at 1098-1102, 1110-11).

[9] When CCC continued to string cable in defiance of the moratorium, the City issued citations to the crews, and then, acting pursuant to BOULDER, COLORADO, CODE §31-10 (1965 rev. ed.), which authorizes the removal of encroachments on the public rights-of-way, removed some of the cable installed in violation of the Ordinances. The record is devoid of evidence of the amount of cable that was removed or of evidence that it was "destroyed." (Petition at 4-5).

relief on the basis of eleven separate claims, including that: the City had conspired with co-defendant BCC in violation of Section 1 of the Sherman Act; the moratorium infringed CCC's First Amendment rights; and the City violated CCC's federal civil rights and various state law rights.

An evidentiary hearing on CCC's motion for a preliminary injunction was held on March 4-6, 1980. At the hearing, testimony was received from eight witnesses and portions of the transcripts of depositions of four City officials and two principals of BCC were received in evidence. The City's witnesses gave uncontroverted testimony about the harmful impact that CCC's existing and expanding cable T.V. operation had on potential competition.[10] Additional uncontroverted testimony described the cable T.V. market and the economic and physical reasons why CCC's wiring of the City threatened to foreclose any future competition and further entrench its *de facto* monopoly.[11]

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[10] The City's expert witness, Carl Pilnick, testified repeatedly that municipal cable T.V. service tends to be a monopoly (Pilnick, March 5 Tr. 96, 129, 132, 151, 166-67, 181, and 187) and added that:

> If it was too far gone, if the first company had so much of an advantage either in construction itself, or being ready for construction, then you could issue a thousand permits, and of the thousand the remaining 999 permittees would really have no practical chance of building an operating system.

(*Id.* at 45; *see also* Westdyke, March 4 Tr. 96, 100).

[11] The record establishes that cable operators do not generally compete against each other "head-to-head"; once a cable is in place, a second, competing line will probably not be installed. No more than 0.1% of the nation's cable systems (6 of 6000) involve competition in the same geographic areas. (Pilnick, March 5 Tr. 38-39, 42-44, 129, 132, 151; Sample, March 4 Tr. 218; Westdyke Dep. 34-39). The record further establishes that traditional cable

On March 17, 1980 — one day before expiration of the 90-day construction moratorium — the District Court enjoined the City "from taking any unilateral action to restrict, limit, or revoke the authority of [CCC] to conduct its cable television business. . . ." *Community Communications Co.* v. *City of Boulder,* 485 F. Supp. 1035, 1041 (D. Colo. 1980) (App. Pet. at A-36, A-46). The trial court found that CCC was unlikely to prove the antitrust conspiracy between the City and BCC, which it had alleged, and that the City's alleged restraint of trade was not *per se* illegal. (*Id.* at A-40, A-42). Having found no conspiracy and without undertaking the requisite economic analysis of the moratorium, the trial court nonetheless based its injunction upon a finding that the City had violated the antitrust laws:

> The [City's] motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation.

(*Id.* at A-43). The trial court rejected the City's claim that its enactment of the moratorium Ordinances was a governmental act exempt from the antitrust laws under *Parker* v. *Brown,* 317 U.S. 341 (1943), because, in the

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economics virtually insure a monopoly, since market penetration rates are not high enough to cover the capital and operating costs of two directly competing systems. (Pilnick, March 5 Tr. 37, 40, 44-46, 54-55). The principal physical barriers to head-to-head competition are the costs associated with the rearrangement of lines on utility poles which is necessary when a second cable T.V. is added and, in areas where cable must be laid underground, the problems associated with digging up roads and homeowners' property a second time and the inevitable extra costs associated with accidental cutting of the first underground cable. (*Id.* at 33-37, 41; Sample, March 4 Tr. 226; Olson, March 6 Tr. 58-63).

trial court's view, the moratorium and the City's efforts to negotiate permits were not a proper exercise of its authority under Colorado law:

> It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. That is not this case. Here, upon the present record, *Parker* v. *Brown* is wholly inapplicable and Boulder is subject to an antitrust liability under *City of Lafayette* v. *Louisiana Power & Light, supra* for the actions which it has taken.

(*Id.* at A-42).

The First Appeal. The City appealed this first injunction to the Tenth Circuit Court of Appeals, on the bases that: the City's actions were entitled to antitrust immunity under *Parker* v. *Brown*; there was no Sherman Act violation; and the injunction was overly broad since the moratorium at issue expired by its terms 24 hours thereafter. On May 28, 1980, the Court of Appeals reversed the preliminary injunction appealed from, holding that the challenged City Ordinances were immune from antitrust liability under the *Parker* doctrine. *Community Communications Co.* v. *City of Boulder,* 630 F.2d 704 (10th Cir. 1980) (reprinted at App. Pet. A-1).

The Court of Appeals focused first on the nature of Boulder's interest in cable T.V., finding that the City's method of regulating cable T.V. was not improper under Colorado law, nor did it "somehow eliminate the *Parker* v. *Brown* considerations," and that "[t]he City is not in the television business in any way, and . . . the action is

an exercise of governmental authority." (*Id.* at A-3, A-6 to A-7). The court also found that the City had adopted "a policy of fostering competition" in the Boulder cable T.V. market. (*Id.* at A-7). The court further found that the City's authority lay in the unique home rule provisions of Article XX, Section 6 of the Colorado Constitution, and concluded that: "The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power." (*Id.* at A-5). Relying on Colorado law, the Court of Appeals noted that the Colorado Supreme Court has interpreted the constitutional grant of authority as conferring "complete authority" on "home rule cities in Colorado as to local matters" and that home rule cities can even supersede contrary state statutes as to matters of local concern. (*Id.* at A-5 to A-6). Finding that the matter at issue — CCC's permit to use Boulder's streets to provide cable T.V. service solely to Boulder residents — was a matter of local concern,[12] the court held that "the regulation of the business of cable T.V. is well within the power and authority of the City of Boulder." (*Id.* at A-7).

The Court of Appeals distinguished *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), because, unlike Boulder, the cities there involved

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[12] The Court of Appeals interpreted the Colorado Constitution for purposes of determining the City's authority under state law and concluded that the City's regulation of the geographical areas in which a City permittee will be allowed to use the City's rights-of-way is obviously a legitimate matter of local concern:

> The franchise of the plantiff cable T.V. company is necessarily limited to service within the City of Boulder. The services provided are limited to City residents through the use of City streets and ways. The matter or subject is a local one.

(App. Pet. at A-6).

owned and operated an electric utility in direct competition with the antitrust claimant. The court further held that in any event the constitutional grant of home rule powers to Boulder satisfied both the requirement of the majority in *City of Lafayette* that immunity be conferred only where the local governmental act was "comprehended within the powers granted to it by the legislature. . . ," 435 U.S. at 394, and the requirement of the plurality that city actions be taken "pursuant to a state policy to displace competition with regulation. . . ," *id.* at 413. (App. Pet. at A-8).

Finally, the Tenth Circuit analyzed Boulder's moratorium Ordinances under the test set forth in this Court's most recent antitrust immunity decision, *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). The Court of Appeals found that the *Midcal* test had been satisfied because the City, exercising sovereign powers granted directly by the Colorado Constitution to act on the "local matters" at issue, had adopted a policy that had been "affirmatively expressed" and actively supervised and enforced. (App. Pet. at A-8). The court concluded that "the trial court was in error as a matter of law as to the basis for issuance" of the injunction and accordingly reversed. (*Id.* at A-9).

On July 1, 1980, after CCC had filed a petition for rehearing, a dissenting opinion was filed.[13] Prior to ruling on the petition, the Court of Appeals ordered an

[13] (App. Pet. at A-10). The dissent argued that the moratorium violated CCC's First Amendment rights and that the preliminary injunction should have been sustained on that ground alone. (*Id.* at A-14 to A-23). Without discussing whether a Sherman Act violation had been established, the dissenting opinion also argued that the preliminary injunction should have been upheld because the City was not entitled to antitrust immunity. (*Id.* at A-24 to A-32).

additional round of briefs by all parties. Rehearing was denied on October 1, 1980.

The Second Injunction. Since the Tenth Circuit decided the first appeal, there have been additional proceedings below that are relevant to this Court's consideration of the Petition. Following the May 28 decision of the Court of Appeals, CCC renewed substantial, additional construction of its cable T.V. system throughout Boulder. In order to prevent CCC from completing its cable system and foreclosing any competition in the Boulder cable market, the City Council reimposed temporary construction moratoria for five additional weeks. On July 22, 1980, the City Council adopted a final Ordinance dividing the City into cable T.V. districts, effective August 22. The districting Ordinance was adopted only after the City Council reluctantly concluded that cable T.V. competition in the same geographic area was not feasible so long as CCC was building throughout the City. The new Ordinance restricted CCC to a district comprised of about one-third of the homes in Boulder (an area CCC has admitted is economically viable), in order to obtain one or more additional operators in the remaining two-thirds of the market.

CCC again moved for a preliminary injunction in this action and, on August 25, 1980, the District Court preliminarily enjoined enforcement of the City's districting Ordinance.[14] Virtually identical to the first injunction, the second injunction was based on antitrust (the court again having found the City not to be immune under *Parker*) and First Amendment grounds.

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[14] The District Court's decision appears at 496 F. Supp. 823 and is reprinted in the Appendix to this Brief.

The Second Appeal. On August 25, 1980, the City noticed an appeal from this second injunction.[15] As a result, again at issue before the Tenth Circuit is the question of the City's immunity from antitrust liability when it acts to promote competition and diversity by adopting Ordinances geographically restricting CCC's cable T.V. construction in Boulder. The City contends that the antitrust immunity issue has been resolved by the Tenth Circuit's earlier decision and that the injunction, to the extent it is based on antitrust grounds, must thus be overturned. CCC, on the other hand, contends that the trial court properly interpreted the earlier Tenth Circuit opinion as granting an antitrust exemption only for the City's adoption of a moratorium on cable construction. (Brief of Appellee in No. 80-1882 at 27-34). Also presented again is the question of whether there is an underlying Sherman Act violation.[16] In addition, complex questions of First Amendment law have been raised. This second appeal has been fully briefed and oral argument has been set for the week of May 11.[17]

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[15] Community Communications Co. v. City of Boulder, *appeal docketed*, No. 80-1882 (10th Cir.).

[16] Although the injunction was based on antitrust grounds, the trial court made no finding that the Sherman Act had been violated.

[17] It should be further noted that the trial court still retains jurisdiction of this action and, only recently, issued an order setting a hearing for March 12, 1981 to discuss the possible severance of claims and defendants for trial. Memorandum Opinion and Order, filed Feb. 9, 1981, in Community Communications Co. v. City of Boulder, No. 80-M-62 (D. Colo.).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Question Presented By This Petition Is Still Before The Tenth Circuit.

Because of the unusual status of the proceedings below, the very question presented by the Petition is still pending before the Tenth Circuit. Except in extraordinary circumstances, the writ should not be granted to review an issue which remains subject to review by the appellate court in the same action. No such extraordinary circumstances are present here. Moreover, the Petitioner has not even referred to the pendency of this second appeal which presents again the issue of Boulder's immunity from the antitrust laws in regulating locally permitted cable T.V. operations. CCC's failure to describe this important procedural setting "with accuracy," a matter which is obviously "essential to ready and adequate understanding of the points requiring consideration," violates Rule 21.5 of this Court and is alone sufficient reason for denying the Petition.[18]

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[18] CCC's silence on the subject is particularly significant because of the spectre of mootness raised by the second appeal. CCC has argued vehemently in the Tenth Circuit that the immunity issue decided on the first appeal is "far different" from that presented by the second appeal. (Brief of Appellee in No. 80-1882 at 27). If the issues are far different, then the antitrust immunity issue which is the subject of the petition for the writ is moot since the City's action to which it applied — a 90-day moratorium — has long since expired and the parties are now litigating over a "far different" cable T.V. districting Ordinance. The City contends in the second appeal that, for purposes of antitrust immunity analysis, the City's temporary moratorium Ordinances and permanent districting Ordinance are indistinguishable. The simple point is, however, that CCC may not play its contentions both ways. It may not maintain before this Court that the Tenth Circuit's decision "cries out for review" because of its widespread import (Petition at 30) and at the same time argue to the Tenth Circuit that its decision applies only to an expired City moratorium Ordinance. (Brief of Appellee in No. 80-1882 at 27, 29).

2. The Tenth Circuit Properly Applied The Antitrust Immunity Standards Established By This Court.

It is important to recognize at the outset that there is no dispute in this case that had the cable T.V. moratorium ordinances at issue here been adopted by the Colorado Legislature, they would be immune from antitrust attack as governmental acts. CCC (and the dissenting opinion below) contend that the governmental immunity ordinarily applicable in these circumstances dissolves solely because a moratorium on local construction, within particular areas of a particular city, was adopted by the home rule municipal government under powers derived directly from the State Constitution. The decision of the Tenth Circuit holding such a municipal governmental act to be immune is wholly consistent with the decisions of this Court.

a. The Tenth Circuit's decision is consistent with *Parker* v. *Brown* and its progeny.

In *Parker* v. *Brown*, this Court reversed an injunction entered against the State of California on antitrust grounds, holding that:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government* which the Sherman Act did not undertake to prohibit.

317 U.S. at 352 (citations omitted; emphasis added). The Tenth Circuit's analysis is consistent with that fundamental principle. The Court of Appeals found that, as to matters of local concern such as local cable T.V. permits, the Colorado Constitution and Colorado law vest the City of Boulder with sovereign powers. To

paraphrase language from this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 360 (1977), in the present case the City of Boulder "is the ultimate body wielding the State's power" within its municipal boundaries "and, thus, the restraint 'is compelled by direction of the State acting as sovereign.' " The City's local action was a "sovereign . . . act of government," *Parker* v. *Brown*, 317 U.S. at 352, and, as such, properly entitled to antitrust immunity.[19] The Tenth Circuit's decision is also consistent with the other antitrust immunity decisions of this Court subsequent to *Parker* v. *Brown*.[20]

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[19] "Immunity" is a shorthand expression for *Parker*'s holding that Congress did not intend to reach such governmental acts under the Sherman Act. *City of Lafayette*, 435 U.S. at 393 n.8. Although the *Parker* doctrine is derived from concepts of federalism, there is an even firmer basis for exempting state and municipal actions. When a state or its political subdivision exercises one of its "attributes of sovereignty" and performs "functions essential to separate and independent existence," Constitutional limitations on the operation of federal laws come into play. *See* National League of Cities v. Usery, 426 U.S. 833, 845 (1976). The Chief Justice has expressly referred to this principle as an additional ground for antitrust immunity. *City of Lafayette*, 435 U.S. at 423.

[20] Of the six antitrust immunity cases decided by this Court since *Parker* v. *Brown*, three [Midcal, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)] have involved attempts by private concerns — not governmental bodies — to shield themselves behind the antitrust immunity of a state government or its subsidiary. The instant case is distinguishable from those cases since here a unit of government seeks immunity, as was the case in *Parker* and two more recent decisions, New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), and *Bates*. In *Bates*, this Court concluded that *Cantor* would have been "an entirely different case if the [antitrust] claim had been directed against a public official or public agency, rather than against a private party." 433 U.S. at 361. Only in *City of Lafayette* has this Court held a governmental unit subject to liability under the antitrust laws. The Tenth Circuit properly distinguished this case from *City of Lafayette*, as is demonstrated at 19-21, *infra*.

b. The Tenth Circuit's decision is consistent with *City of Lafayette*.

In *City of Lafayette*, this Court concluded that although the *Parker* immunity is available for municipalities under certain circumstances, it was not available to immunize predatory market activities by a city-owned electric utility. By a 5-4 vote, the Court affirmed the Fifth Circuit's holding that the immunity would apply only if a city's actions " 'are comprehended within the powers granted to it by the legislature.' " 435 U.S. at 394. A plurality of the Court would have limited the *Parker* exemption for cities to acts which are "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The Chief Justice concurred in the judgment on the basis that the state action exemption did not apply when a city's "business activity" made the case "an ordinary dispute among competitors in the same market." *Id.* at 418, 419. Four Justices dissented on the basis that the actions of the states and their political subdivisions are equally exempt under *Parker*. *Id.* at 426.

Boulder's moratorium Ordinances qualify for immunity under the tests set forth in *City of Lafayette* by the majority, the plurality, the Chief Justice's concurrence, and the dissent.[21] Contrary to Petitioner's claims,

[21] Commentators have noted that five members of the Court would apparently uphold the *Parker* v. *Brown* exemption even where the plurality's requirement is unfulfilled.

> Implicit in [the Chief Justice's] reasoning is the assumption that a municipality acting in a governmental capacity should be exempt from the antitrust laws. Thus, if a future case presents a "governmental" activity not authorized by the state, five members of the Court evidently would vote to exempt the municipality from the antitrust laws.

The Supreme Court, 1977 Term, 92 HARV. L. REV. 57, 281 (1978) (footnotes omitted).

the Tenth Circuit's decision is consistent with the majority[22] and plurality opinions. The majority opinion (Part I) quoted and apparently embraced the ruling below by the Fifth Circuit that would immunize the governmental acts of cities when it may be inferred "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U.S. at 394. Here the action complained of (a local construction moratorium) is plainly within the authority given the home rule City of Boulder and is contemplated by its constitutional grant of powers directly from the people.

Similarily, although the plurality reasoned that a city's actions would be exempt only if they were taken "pursuant to a state policy to displace competition with regulation," 435 U.S. at 413, the plurality further concluded that:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [W]e agree with the [Fifth Circuit] Court of Appeals that an adequate state mandate for anticompetitive activities of cities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

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[22] CCC asserts that the decision below conflicts with the holding of the majority in *City of Lafayette*. As support for its claim, CCC offers eight lengthy quotations from *City of Lafayette* (Petition at 7-8, 20), but fails to disclose that seven of these quotations are taken from the plurality opinion and not from Part I of the opinion, which is the only part commanding the votes of five Justices.

Id. at 415. The plurality adopted the Fifth Circuit's view that "it is not necessary to point to an express statutory mandate for each act," that it is instead sufficient if the municipal acts "are comprehended within the powers granted to it by the legislature." *Id.* at 393-94. No talismanic legislative words are required and the " 'district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.' "[23] *Id.* at 394.

The Tenth Circuit's decision is fully consistent with this approach. Although it distinguished the present case from *City of Lafayette* on the facts, it also applied the plurality's reasoning and found the requisite state policy in the Colorado Constitution's grant to Boulder of exclusive power over matters of local concern.[24] It is clear

[23] Petitioner and *amicus curiae* assert that since the Colorado Legislature has adopted no policy relating explicitly to cable T.V., and it has adopted an overall antitrust policy under Colorado's antitrust statute, then the home rule cities of the State are foreclosed from regulating cable T.V. in any manner which conflicts with the State antitrust law. (Petition at 26, 29; *Amicus Curiae* Brief at 15). This attempt to divine a restrictive legislative intent is wholly without merit. Colorado home rule cities have been prominently regulating cable T.V. for almost 20 years (since 1964 in the case of Boulder) and, in some home rule cities such regulation has even fixed the prices for local, monopoly cable T.V. service [*e.g.*, Manor Vail Condominium Association v. Town of Vail, _____ Colo. _____, 604 P.2d 1168 (1980)]. The State Legislature has acquiesced in this regulation and at no time during this long period has the Legislature attempted to bar such local regulation. Moreover, in *Manor Vail*, the Colorado Supreme Court implicitly acknowledged the power of home rule cities even to fix the prices for monopoly cable T.V. service. *See* discussion at 25 n.37, *infra*.

[24] The Tenth Circuit's analysis is also consistent with recent decisions of the Third and Fifth Circuits which have held that express state authorization is unnecessary since the authority for the actions of a state instrumentality " 'may be inferred from the nature of

from the powers and duties given to the home rule City of Boulder that the local acts here at issue were "comprehended within the powers granted to it" (435 U.S. at 394) by the people of Colorado, the grantors of those powers.[25]

c. The Tenth Circuit properly distinguished *City of Lafayette* on the facts.

A majority of this Court held in *City of Lafayette* that although cities may in certain circumstances be immune from the antitrust laws, the cities of Lafayette and Plaquemine, Louisiana, were not entitled to immunity on the facts of that case. The Chief Justice's concurring opinion makes it clear that he denied the cities immunity because they were " 'engaging in what is clearly a business activity; activity in which a profit is realized' " (435 U.S. at 418) and because the case presented "an ordinary dispute among competitors in the same market."

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the powers and duties given to a particular government entity. . . .' " Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978).

[25] CCC contends that: "Colorado's Home Rule Amendment contemplates neither the kind of act at issue here, revocation of cable permit by enactment of municipal ordinances, nor the anticompetitive effects of such act. . . ." (Petition at 28). Thus, CCC asserts that the City is without power to revoke a cable T.V. permit. This contention is flatly wrong under Colorado law and leads to an absurd result. It is wrong on the law because Section 115 of the Boulder City Charter and Article II, Section 11 of the Colorado Constitution both require that all municipal permits and franchises be revocable at will by the City Council. It leads to an absurd result because, on CCC's analysis, if the home rule amendment does not contemplate revocation of a cable permit, then *a fortiori* it could not contemplate the granting of such a permit in the first place.

Id. at 419. It is equally clear from a review of the plurality opinion that the potential impact of cities' "economic choices," made "in the conduct of their business affairs" without antitrust liability, was a determining factor in that opinion.[26] Another factor taken into account by the Court was the highly predatory conduct, including patently illegal tie-ins, for which the cities sought antitrust immunity. *Id.* at 403-05, 405 n.31.

The Tenth Circuit distinguished the present case from *City of Lafayette* on the basis of the differences in the facts. The court reasoned that Boulder was entitled to immunity where the Louisiana cities were not because Boulder, unlike Lafayette and Plaquemine, was not acting as an "owner or provider of services" (435 U.S. at 408) and because Boulder's dispute with CCC is not simply "one among competitors in the same market." 435 U.S. at 419.[27] The Tenth Circuit properly found that

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[26] [T]he economic choices made by public corporations in the conduct of their business affairs . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations. . . .

435 U.S. at 403.

When these bodies [municipalities] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate. . . .

435 U.S. at 408.

[27] The Tenth Circuit characterized the Louisiana cities' actions as "proprietary" to distinguish them from Boulder's governmental acts. (App. Pet. at A-6 to A-7). This distinction is used by the Chief Justice in his concurring opinion in *City of Lafayette*: "I use the term 'proprietary' only to focus attention on the fact that all of the parties are in a competitive relationship. . . ." 435 U.S. at 422 n.3. CCC's hornbook and state law definitions drawn from other contexts for other purposes are irrelevant; as used by the Tenth Circuit the term has reference to a municipality's business activities in competition with private enterprises.

"[t]he City is not in the television business in any way. . . ." (App. Pet. at A-6 to A-7). Neither has Boulder engaged in any of the pernicious trade restraints that the Louisiana cities were alleged to have committed. Enactment of the Boulder City moratorium Ordinances was not the act of one competing in the marketplace. Boulder was engaged solely in governmental acts regulating cable T.V. within the City's boundaries. The Tenth Circuit properly concluded that this Court's denial of antitrust immunity in *City of Lafayette* was based on facts not applicable to the City of Boulder.

3. The Tenth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

Petitioner CCC and *amicus curiae* apparently agree that there is no conflict among the federal courts of appeals on the "same matter" presented here which would justify granting the writ. *See* Sup. Ct. R. 17.1(a); *Amicus Curiae* Brief at 8 n.8. The City also agrees that there are no federal court of appeals decisions on the same matter, much less in conflict with the decision subject to the present Petition. Moreover, the absence of such appellate court decisions seriously undermines CCC's claim that the state immunity question decided below presents issues of urgent, nationwide significance.

Amicus curiae contends, however, that recent decisions of a few federal district courts are in conflict over the antitrust immunity accorded the City of Boulder by the Tenth Circuit. *See Amicus Curiae* Brief at 5-8. The district court decisions relied on by *amicus* are not in

direct conflict with each other[28] or with the Tenth Circuit's ruling.[29] In any event, the two district court opinions on which *amicus* places greatest reliance are now on appeal in the Sixth and Tenth Circuits.[30] This Court should not exercise its discretion to grant the writ in this case on the basis of the results in district court decisions until the antitrust immunity issues in those cases have been fully ventilated and decided by the courts of appeals which now have those matters before them.

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[28] In Pueblo Aircraft Service, Inc. v. City of Pueblo, 498 F. Supp. 1205 (D. Colo.), *appeal docketed*, No. 80-2083 (10th Cir. Oct. 16, 1980), and Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), *appeal docketed sub nom.* Hybrid Equipment Corp. v. City of Akron, No. 80-3121 (6th Cir. Jan. 14, 1980), the district courts upheld municipal antitrust immunity on the basis of constitutional grants of municipal authority. By contrast, the district courts in Cedar-Riverside Associates, Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Associates, Inc. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979), and Woolen v. Surtran Taxicabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978), rejected antitrust immunity for certain subordinate actions of cities empowered only by statutory home rule provisions.

[29] The *amicus* contends that the immunity issue presented here is indistinguishable from that presented in Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1031 (N.D. Tex. 1978), where the District Court rejected the *Parker* exemption claimed by four Texas cities in a suit challenging their operation of the Dallas-Fort Worth Airport. The *Woolen* decision is distinguishable from Boulder's case, and the court below so distinguished it (March 6 Tr. 121-25) because Colorado home rule powers are much broader than those conferred in Texas. Moreover, the case is further distinguishable because, unlike the situation in Colorado, a Texas statute directly regulating the challenged city action (operating an airport) expressly denied the cities authority to violate the federal antitrust laws.

[30] These are the *Glenwillow Landfill* and *Pueblo Aircraft* cases discussed at n.28, *supra; Amicus Curiae* Brief at 5-6.

4. The Tenth Circuit's Decision Is Dependent Upon Controlling And Unusual Issues Of State Law Which Limit Its Scope And Application.

Boulder's immunity from antitrust liability is based upon what the trial court (March 6 Tr. 123) and the Court of Appeals (App. Pet. at A-4 to A-6) found were unique home rule powers under the Colorado Constitution. As the Court of Appeals concluded:

> The trial court said during the hearing as to authority for the City of Boulder:
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> > "THE COURT: If you get down to the ultimate source of power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. That's what Colorado's Article 20 is all about."
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> The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power. See the references in *City and County of Denver* v. *Henry*, 95 Colo. 582, 38 P.2d 895, to the situations where an ordinance may even supersede a state statute as to matters of purely local concern. *See also Service Oil Co.* v. *Rhodus*, 179 Colo. 335, 500 P.2d 807, and *Davis* v. *City and County of Denver*, 140 Colo. 30, 342 P.2d 674.

(App. Pet. at A-4 to A-6). The fundamental factors which render Colorado's home rule powers unique are its source — the people of the State of Colorado through the Colorado Constitution — and its scope —

exclusive authority as to matters of local concern. *See Four County Metropolitan Capital Improvements District* v. *Board of County Commissioners*, 149 Colo. 284, 369 P.2d 67 (1962). These factors necessarily preclude the application of Boulder's antitrust immunity to the other states which comprise the Tenth Circuit's jurisdiction. Although home rule cities in Oklahoma and New Mexico derive their authority from self-executing constitutional provisions[31], the autonomy of home rule cities in both states is restricted and subject to control by the legislatures.[32] In the other Tenth Circuit jurisdictions, Wyoming, Utah and Kansas, home rule cities have even less autonomy since they may not operate until their respective legislatures have adopted enabling legislation.[33]

The ruling of the Tenth Circuit has no direct application beyond the jurisdictional boundaries of that Circuit. Furthermore, Colorado's constitutional home rule provisions are distinguishable from each of the 34 other states which have constitutional provisions for city home rule. Fourteen of the states have mandatory provisions requiring enabling legislation;[34] eleven other states

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[31] N.M. CONST. art. X, §6; OKLA. CONST. art. XVIII, §3.

[32] N.M. CONST. art. X, §36, provides that " [a] municipality which adopts a charter may exercise all legislative powers and *perform all functions not expressly denied by general law or charter.*" (Emphasis added). In Oklahoma, a statute grants supremacy over conflicting state laws to charters but not ordinances of home rule cities. OKLA. STAT. ANN. tit. 11, §13-109.

[33] WYO. CONST. art. XIII, §1; UTAH CONST. art XI, §5; KAN. CONST. art. XII, §5.

[34] ALAS. CONST. art. X; CAL. CONST. art. XI, §§3, 5-7; ME. CONST. art. VIII-A; MICH. CONST. art. VII, §22; MONT. CONST. art. XI, §§5-6; N.Y. CONST. art. IX; N.D. CONST. art. VII, §1; OHIO CONST. art. XVIII; PA. CONST. art. IX, §2; S.C. CONST. art. VIII, §11; TENN. CONST. art. IX, §9; WASH. CONST. art. XI, §10; W.VA. CONST. art. VI, §39(a); WIS. CONST. art. XI, §3.

have permissive provisions which allow state legislatures to delegate or withhold power to home rule cities;[35] nine states have self-executing provisions similar to Colorado's, but none share with Colorado the exclusive power over local matters conferred by the Colorado Constitution.[36]

The immunity conferred by the Tenth Circuit decision is limited not only by the type of authority exercised by the home rule city but also by the manner in which such authority is exercised. The Tenth Circuit decision makes clear that immunity extends only to the city's governmental actions pertaining to matters of local concern where the city is constitutionally entitled to act.[37]

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[35] CONN. CONST. art. X; FLA. CONST. art. VIII, §2; GA. CONST. art. IX, §111, Ch. 2-60; HAW. CONST. art. VIII, §2; IDAHO CONST. art. XII, §2; IOWA CONST. art. III, §38A; MINN. CONST. art. XII; MO. CONST. art. VI, §19; NEV. CONST. art. VIII, §8; N.H. CONST. pt. I, art. XXXIX; ORE. CONST. art. XI, §2.

[36] ARIZ. CONST. art. XIII, §§2-3; ILL. CONST. art. VII, §6; LA. CONST. art. VI, §§5-6; MD. CONST. art. XI-E; MASS. CONST. art. II; NEB. CONST. art. XI, §§2-5; R.I. CONST. art. XXVIII; S.D. CONST. art. IX, §2; TEX. CONST. art. XI, §5.

[37] (App. Pet. at A-7, A-8). The authority of Colorado home rule cities to regulate cable T.V. has recently been acknowledged by the Colorado Supreme Court in a decision upon which the Tenth Circuit relied in rendering its judgment in the present case. *See* the Tenth Circuit's discussion of Manor Vail Condominium Ass'n v. Town of Vail, _____ Colo. _____, 604 P.2d 1168 (1980), cited at App. Pet. A-3 to A-4. The *Manor Vail* case is also significant because the position Petitioner took in that case on the issue of home rule cities' powers over local cable T.V. operations contrasts so vividly with its position before this Court. In the trial court proceeding in *Manor Vail*, the executive vice president of CCC's parent company, TCI, had testified at length in support of the validity of the home rule city of Vail's ordinance fixing prices for cable T.V. services offered in Vail by a TCI subsidiary. (Transcript of July 6-8, 1976 Hearing in Fifth Judicial District of Colorado

Actions by a city which is in competition in the marketplace, as were the municipalities in *City of Lafayette*, are not immune under the Tenth Circuit's decision. Equally unprotected are private persons who conspire with a city or with whom a city acquiesces in a private conspiracy, as in *Cantor* or *Goldfarb*.

No general rules or categories of immunity are established by the Tenth Circuit's decision. Rather, the decision demonstrates the need for case-by-case analysis. As the majority in *City of Lafayette* concluded, in adopting the Fifth Circuit's ruling:

> Whether a governmental body's actions are comprehended within the powers granted it by the legislature is, of course, a determination which can be made only under the specific facts in each case.

435 U.S. at 394. The Tenth Circuit made precisely this kind of case-by-case analysis and based its antitrust immunity decision upon the specific facts and upon the distinguishing features that the immunity was asserted by the governmental entity itself, the action in question was a peculiarly local governmental regulation, and the action was adopted pursuant to the unique home rule powers conferred by the Colorado Constitution. These circumstances narrow the scope of the immunity and significantly limit its applicability to other cities and contexts.

(Civ. Action No. 2260) at 239-84). TCI also defended Vail's price-fixing ordinance on the ground that it "represents the legitimate and valid exercise by the Town of its power to grant a franchise to [the TCI subsidiary]" and that cable T.V. is "a private business affected with the public interest." (Answer of Community Television Investment, Inc. at 3-4). In the present case, when the challenged City regulations, by stimulating competition, threaten CCC's objective to "be the only show in town" (Varnes March 6 Tr. 22), Petitioner claims that the City of Boulder is without authority to regulate cable T.V. The Tenth Circuit expressly noted Petitioner's chameleon-like approach to this crucial issue. (App. Pet. at A-4).

5. The Tenth Circuit's Judgment Is Supportable On Additional Grounds.

This case is unlike other antitrust immunity decisions of this Court in which underlying and even *per se* violations of the Sherman Act were evident.[38] In this case, there is no antitrust violation at all, let alone a *per se* violation. When the conspiracy alleged in the complaint was found not to exist (App. Pet. at A-40), a new theory of conspiracy was created out of a whole cloth on the basis of an inapposite analogy.[39] Moreover, a governmental authority's imposition of a temporary construction moratorium on a monopoly supplier of services does not fall into any of the established categories of *per se* violations[40] and does not constitute an unreasonable

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[38] *See, e.g.*, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (price fixing); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) (tying); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (tying); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (price fixing).

[39] The trial court drew an analogy to a line of cases in which suppliers tried to force distributors into complying with an underlying illegal agreement. (App. Pet. at A-43). *See, e.g.*, Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968), in which a "conspiracy" was found between a supplier and its distributor where the supplier used its contractual power to terminate in an attempt to make the distributor continue to comply with a *per se* illegal resale price maintenance agreement. *Sahm* and like cases are inapplicable here because (1) there is no underlying illegal contract, (2) the challenged activity was not an attempt to enforce such a contract, (3) CCC never complied with the moratorium, and (4) there is no evidence that the moratorium was intended as a punishment to CCC. Moreover, the analogy to *Sahm* is faulty from a factual point of view; the City and CCC are not in a commercial relationship such as that between manufacturer and distributor.

[40] The *per se* violations, cataloged in Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958), consist of price fixing, resale price maintenance, market allocations among competitors, and

restraint of trade under traditional Rule of Reason standards.[41] Although the Tenth Circuit did not reach the question since its decision rested on antitrust immunity grounds, the record demonstrates that the District Court erred as to matters of law in basing its injunction on alleged Sherman Act violations.[42] This Court should not exercise its discretion to review a question of antitrust immunity — a question of potential Constitutional dimensions — where it is clear that no antitrust violation has occurred.

In addition, the Tenth Circuit's judgment reversing the trial court's preliminary injunction must be affirmed in any event because the trial court committed other errors in issuing the injunction. The trial court broadly enjoined all future action by the City on the basis of a 90-day moratorium which expired the next day without finding a "reasonable likelihood of further violation in

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tying agreements. Vertical territorial allocations, to which the trial court inaptly analogized the relationship between the City and CCC, are not *per se* violations. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[41] Despite the District Court's explicit rejection of *per se* rules, it failed to conduct the rigorous analysis of the competitive impact of the challenged activity mandated by the Rule of Reason. National Society of Professional Engineers v. United States, 435 U.S. 679, 687-92 (1978); Board of Trade of the City of Chicago v. United States, 246 U.S. 231, 238-41 (1918). Its analysis is remarkably akin to a *per se* approach, consisting solely of an insupportable conclusion that competition in cable T.V. is possible (App. Pet. at A-43) and a bald statement that the moratorium effected "a restraint of trade and an artificial and geographical market allocation." (*Id.*).

[42] Although *amicus curiae* vigorously maintains that the City should not be immune from the antitrust laws, it has argued equally vigorously below, through *amicus* briefs filed by the State Attorney General with the trial court and with the Tenth Circuit, that the City has not violated the antitrust laws and that the immunity issue need not have been reached.

the future." *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 99 (2d Cir. 1978). The courts have denied injunctions in antitrust cases where the plaintiff has failed to prove a likelihood of future violations or ongoing harm from a past violation. *See, e.g., United States* v. *Parke, Davis Co.* 365 U.S. 125, 126 (1961) (*per curiam*); *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 236 (9th Cir. 1976). In the present action, the trial court made no finding whatsoever that future antitrust violations were likely or were threatened to occur. Indeed, the record firmly belies any such finding since, in the words of the trial court, "[i]t is inappropriate to ascribe any illegal or improper intent to action which has not yet been taken. . . ." (App. Pet. at A-44).

Finally, the Tenth Circuit's judgment reversing the trial court's injunction must be affirmed because the injunction was based upon the erroneous holding that an antitrust plaintiff need show no injury at all, much less irreparable injury, in order to obtain an injunction:

> THE COURT: Let me clear that up. If I reached a conclusion that the moratorium violates the antitrust laws, damage doesn't make much difference, because I am going to enjoin a violation of the antitrust laws whether that involves great and irrevocable damage or not. . . .

(March 6 Tr. 138). This ruling compels reversal because it is directly contrary to the governing statute, Section 16 of the Clayton Act (15 U.S.C. §26), which provides for injunctive relief in antitrust cases:

> [W]hen and under the same conditions and principles as injunctive relief . . . is granted by courts of equity, . . . and upon . . . a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

Proof of irreparable injury, or the threat that it will occur in the future is an essential prerequisite to injunctive relief. *Id.*; *SCM Corp.* v. *Xerox Corp.*, 507 F.2d 358, 363 (2d Cir. 1974); *Hardin* v. *Houston Chronicle Publishing Co.*, 426 F. Supp. 1114 (S.D. Tex. 1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978). In the instant case, the record demonstrates that CCC made no such showing.

This Court should refrain from granting the writ to review the broader issue of antitrust immunity where the judgment of the Court of Appeals is fully supportable on other grounds.

CONCLUSION

For all of the foregoing reasons, Respondent City of Boulder prays that the writ of certiorari be denied.

Respectfully submitted,

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March 12, 1981

APPENDIX

UNITED STATES DISTRICT COURT,
DISTRICT OF COLORADO

COMMUNITY COMMUNICATIONS COMPANY, INC., *Plaintiff,*

v.

CITY OF BOULDER *et al., Defendants.*

Civ. A. No. 80-M-62

September 5, 1980

MEMORANDUM OPINION AND ORDER

MATSCH, District Judge.

For a second time I have found it necessary to use the power of a preliminary injunction to protect Community Communications Company, Inc. (CCC) from irrevocable injury pending the final resolution of the dispute between the plaintiff and the City of Boulder. In an earlier Memorandum Opinion and Order, entered on March 17, 1980, and reported as *Community Communications Company, Inc.* v. *City of Boulder*, 485 F.Supp. 1035 (D.Colo. 1980) I described the circumstances giving cause for the complaint which first brought the parties into this Court. As there indicated, on December 19, 1979 the Boulder City Council passed an emergency ordinance which restricted the rights granted in a 1964 ordinance by prohibiting CCC from extending service to new customers for three months. The purpose of that moratorium was to limit the growth of the business of CCC while the City sought to negotiate with CCC, and other companies, for a new contract to service the City's residents in a manner which the City Council might consider appropriate. In the view of the City Council the presence of CCC operating a community antennae service in a small area of the city created such a threat of a monopolistic advantage as to require that restriction to permit other companies to come in with competing proposals.

In issuing that first injunction, I recognized that the period of limitation was about to expire without accomplishment of the City's objectives and that the very fluid facts of the case were still developing. Accordingly, while I decided that the antitrust implications controlled the question of a preliminary order, I also sought to caution the City about the possibilities of First Amendment involvement and other questions of possible constitutional concern.

The moratorium had already expired when the City's appeal of that injunctive order was argued to a three-judge panel of the Tenth Circuit Court of Appeals. Acting entirely on its own motion, and without any explanation, that panel went beyond the moratorium ordinance and entered its own order preventing CCC from expanding its service area until further order of the appellate court. On May 28, 1980, an opinion for two judges of the panel was filed, directing the reversal of my order, remanding the case, and terminating the stay order. It was further noted that Judge Markey[1] would be submitting a separate opinion.

He filed a vigorous dissent on July 1, 1980. On that same day, the Boulder City Council took new action against the plaintiff by passing Ordinance No. 4515 on first reading. The Council had earlier enacted emergency ordinances on June 3 and June 24, providing for additional periods of temporary restrictions of the plaintiff's expansion plans while the Council attempted to determine its position on the future of cable television in that community. I denied new motions for temporary restraining orders during that time, to enable the Boulder City Council to go forward with its legislative process. A motion for reconsideration filed in the Court of Appeals by CCC on June 25, 1980 has not yet been determined. Accordingly, I have not yet received a mandate from the Court of Appeals.

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[1] Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

The questions presented by Ordinance No. 4515 are far different from what was before me earlier and now before the Court of Appeals. Because time is a critical element, it has been necessary to go forward on the plaintiff's amended complaint and second motion for preliminary injunction without waiting for further action by the appellate court. Additionally, the City also filed its own motion for a preliminary order to prevent the plaintiff from violating the restrictions of the new ordinance.

Before turning to the questions presented, it is appropriate again to recognize that the case is not yet presented on the merits. While the evidence before me is extensive, and while the City has presented what purports to be the complete legislative record, I do not now know what further proof the plaintiff may submit to establish conspiratorial conduct among the named defendants.

Ordinance No. 4515, finally adopted on July 22, 1980, with an effective date of August 21, 1980, places a permanent geographic limitation on the plaintiff's pre-existing contract right to establish and operate a cable television communications system throughout the City of Boulder. More particularly, that right has now been reduced to a permission to provide service to a prescribed area encompassing only one-third of the City's residents. That area includes the portion of the city in which CCC has historically functioned as a community antennae system, plus the area it had expanded into prior to July 1, 1980.

The impasse which has developed between CCC and Boulder must be broken by granting one of their motions for a preliminary injunction. Thus, either the plaintiff must be prohibited from violating or the City must be prevented from enforcing Ordinance No. 4515. Recognizing the complexity of the legal issues and the absence of controlling precedent, and appropriate analysis should begin with a comparison of the competing claims of irreparable injury in the absence of injunctive relief.

The City's claim is that it is seeking advanced, state-of-the-art communications services for its citizens and that while other companies have expressed an interest in providing such services on terms to be negotiated, all of them have declined to proceed unless CCC is excluded from the market area. Thus, it is argued that unless the plaintiff is prohibited from expanding into the area to be made available to other companies, the negotiating process will be seriously disrupted.

Conversely, CCC contends that the City's revocation of the right to conduct business in two-thirds of the city, simply to benefit other companies, constitutes an unlawful restraint of trade in violation of Section 1 of the Sherman Act; that it infringes rights protected by the First Amendment; that it denies equal protection of the law; that it constitutes an inverse condemnation of the plaintiff's property; and that it otherwise is an unconstitutional infringement of contractual and property rights.

The test for whether irreparable injury exists, requiring the equitable remedy of injunction, is the inadequacy of the recognized legal remedy if the party seeking the preliminary injunction ultimately prevails. In this case, with conflicting claims of such irreparable injury, the question becomes one of the comparative capacity of the Court to right the wrong to the party who finally wins on the merits.

If enforcement of the ordinance is now enjoined, but the City's position is later determined to be correct, the only apparent loss is the time it may take to complete the negotiating process with other companies, free from the inhibiting influences of the plaintiff's market position and this lawsuit. The mere stringing of cables is not a significant concern because this Court obviously has the authority to require the plaintiff to remove those cables and to make any necessary adjustments with customers who are later determined to be outside of CCC's authorized service area.

Alternatively, if the plaintiff is compelled to abide by an ordinance which is later invalidated, the foreseeable injuries

may, by their very nature, be irreversible. To the extent that First Amendment rights are infringed, irreparable injury is presumed. *Elrod* v. *Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976) (Brennan, J.); *Westinghouse Broadcasting Co.* v. *Dukakis,* 409 F.Supp. 895 (D.Mass. 1976); *Borreca* v. *Fasi,* 369 F.Supp. 906 (D.Haw.1974). Similarly, injunctions are often granted in favor of private antitrust plaintiffs when there is a threat of injury and the prevailing public interest in competitive market conditions will be served. *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Finally, in considering the public interest, there is the apparent difficulty of measuring the plaintiff's economic loss in money damages coupled with the devastating impact of a large judgment on the defendant municipality and its citizens. And there should be concern for those persons who may want to subscribe to the services provided by CCC while this case is pending. (Exhibit I-2e, pp. 1540-42). Accordingly, it is my judgment that the relative risks of irreversible injury to the parties, as well as the public interest, compel the conclusion that enforcement of the ordinance must now be enjoined.

The questions of law which are presented in this case are difficult and novel. In ruling on a motion for a preliminary injunction, the probabilities of final success on the merits must be considered; but "it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain. *** (I)t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Continental Oil Co.* v. *Frontier Refining Co.,* 338 F.2d 780, 781-82 (10th Cir. 1964). There is no doubt in this case that plaintiff has met such a standard and is entitled to injunctive relief from enforcement of the new ordinance.

The facts now before me are markedly different from those involved in the preliminary injunction which is now on appeal. We are no longer concerned with the adverse effects

of a temporary interruption of the plaintiff's business. There has now been a unilateral revocation of its right to reach the major portion of the Boulder market for purposes which are questionable, considering the constitutional principle of limiting government to delegated powers.

The stated reason for the revocation is to create side-by-side competition so that different cable companies are "exposed to review and comparison" (Exhibit I-2e, p. 1524), the ultimate objective being to obtain a permittee promising the most advanced programming and communications services. Since the record shows that CCC has in fact "offered" what appears to be a state-of-the-art system through its response to the application process in February, 1980 (Exhibit I-2c, pp. 965-1095), a fair inference is that its fault is not a failure to "offer" such service for consumers, but a refusal to be contractually bound to provide programming subject to the approval of the City's government. Throughout the 1979 study sessions there are such comments as: ". . . you may be able to extract some additional concessions in terms of either their contribution or their local programming commitment" and: ". . . this is what we want if you're going to do anything in this community." (Exhibit I-2a, pp. 39, 54). A status report by the library director was critical of the present permit because it "offers no guarantees" that expanded programming will occur. (Exhibit I-2a, p. 89).

The City Attorney's position in 1979 was that a Boulder franchise "should include reservation of channels and reservation of some responsibility for determining both programming as well as simply channel-by-channel programming by the cable company" (Exhibit I-2a, p. 114), and his position now continues to be that the plaintiff's proposal in February of 1980, though it outlines a sophisticated and wide-range system, offers the City "virtually nothing" because the programming is not made mandatory (Exhibit I-2e, p. 1550).

As currently presented, the policy of the City Council is much different from the stated objective of the moratorium, which was merely solicitation of interest by other companies in the Boulder market. Permanent districting imposes rigid control over natural market forces, raising obvious antitrust concerns which would not be removed even if Chief Judge Seth's opinion becomes the law of this case.

Immunity from antitrust laws is granted only for governmental action which meets the requirements set out by the Supreme Court in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Thus, the actions must be governmental in nature and they must be taken pursuant to a clearly articulated and affirmatively expressed policy. Additionally, the governmental entity must actively supervise the implementation of that policy by comprehensive regulation, monitoring of conditions, and pointed re-examination of the process. In Judge Seth's opinion, a home rule city in Colorado can claim immunity for a temporary moratorium imposed to foster competition for obtaining a franchise because the Colorado Supreme Court impliedly recognized a municipality's authority to impose rate regulations in a cable system that operates by franchise. *Manor Vail* v. *Town of Vail*, 604 P.2d 1168 (Colo. 1980).

The permanent exclusion of plaintiff from two-thirds of the City, under a policy requiring continual supervision of what is being offered in terms of programming and communications services, is a much different action with more far-reaching consequences. The initial issue is whether the stated purposes for the exclusion indicate a proprietary rather than a governmental interest. Rather than simply fostering proposals from other companies on a non-exclusive basis, the City now must establish a system of regulation that oversees the "quantity and quality" of cable communications and perhaps dictates certain results through contract negotiations. Essentially, through the mechanisms required by *Midcal*, the City must take control of the future of cable television in Boulder in a manner which is actually proprietary.

While rate regulation in Vail or the solicitation of proposals for permits in Boulder may be considered matters of such local concern as to justify the exercise of sovereign authority by a home rule city, it is certainly doubtful whether control over the quantity and quality of communications can be so characterized. Indeed, the City has relied heavily on FCC cases to justify its conduct here; i.e., *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 297 (1978), without acknowledging the difference between the authority which the United States Congress has delegated to the FCC to patrol the public airways and the parochial interests of the Boulder City Council in protecting the city's streets and alleys. Moreover, the FCC itself has reduced its regulation over cable television because of its unsettled state of development and the differences between cable and the broadcast system. *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied* 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372. See also Exhibit I-2a, p. 91A.

What is required for Boulder to obtain antitrust immunity is exactly that which creates grave First Amendment concerns. While I may have some disagreement with the almost absolutist views expressed by Judge Markey in his dissenting opinion in the Tenth Circuit, it does seem to me that the stated objective of bringing about greater diversity in programming and services will inexorably lead to such control over content as is prohibited by the First Amendment policy of freedom from government control of communications. Even if the governmental interest is viewed as legitimate, the method used to advance it must, under the First Amendment, be substantially capable of serving that interest and it must do so in a manner that is least restrictive of protected rights of speech. *Village of Schaumburg* v. *Citizens for a Better Environment*, _____ U.S. _____, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). There is little in this record to suggest that the objective of achieving diversity in programming and services will be served by a districting ordinance which prohibits the

plaintiff from conducting business in the area reserved for others.[2]

Legitimate concerns about repair of property or service blackouts may be addressed directly by a regulation imposing penalties for failure to correct such problems within a reasonable time. Likewise, a governmental interest in public service programming can be achieved in a direct fashion by negotiation for channels and payment of a fair price for the use of those channels.

Expecting a private communicator to provide, without charge, whatever the City Council may want without a showing of sufficient citizen demand or assurance of company benefit raises concerns both of coerced speech and of proprietary control by government. A generalized judicial approval of regulatory authority over cable television creates the danger that municipal governments may use the leverage of their ownership of the rights-of-way, which provide access to the public, for the exercise of pervasive control over content in an important part of the communications industry. Indeed, if such control is not maintained, can a city assert that active supervision which is required for its antitrust immunity?

It is difficult for me to see how Boulder can avoid the limitations of both of the two national policies which are strongly involved in this case. To achieve its stated purposes by exercising pervasive controls over cable communications is to violate the First Amendment, and a failure to exercise just such controls is to lose any legitimate claim of antitrust exemption.

Even if districting is acceptable as a means of furthering a legitimate governmental interest in cable television, what is

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[2] The City's own cable television expert specifically recommended against districting as not improving competition and not achieving any of the City's objectives other than giving "a piece of the action" to another company. (Exhibits I-2d, p. 1426 and I-2e, pp. 1508-1512).

the justification for the permanent exclusion of CCC from any access to the restricted area? While the legislative record includes some generalized expressions of discontent with CCC, counsel for the City conceded during oral argument that Boulder does not claim a right to revoke the plaintiff's permit because of a failure to perform any of its obligations. To criticize CCC for providing only the community antennae service to a small portion of the city for many years, without building an advanced communication system for the entire city, does not seem warranted by the evidentiary record. In my earlier opinion in this case, I noted that the evidence shows that the impact of satellite technology on the cable television industry has been very recent. And there is nothing to indicate that the City Council took any significant interest in cable television before the years 1973 and 1974, during which two attempts were made to interest other companies in the Boulder market (Exhibit I-2a, pp. 86-87). The fact that those efforts failed because of financial difficulties suggests that the plaintiff's reluctance to expand was appropriate.

It appears that from 1975 to 1978 some of the City's employees were urging expansion, but that CCC continued to be cautious. It does seem to be significant that the announcement of the palintiff's plans to extend its operation in May, 1979, evoked an initial enthusiastic response from the Mayor; but, that attitude changed when Boulder Communications Company expressed its interest. It may also be significant that BCC was initially quite willing to accept a permit to construct a system in competition with CCC but that willingness changed when the City Council began to indicate an interest in regulating the market. It is also noteworthy that in the discussions at the Council meetings leading to the enactment of Ordinance No. 4515 the president of BCC was a very strong advocate of the districting approach.

While there are some differences between the long-recognized freedom of the print media and that which is emerging for cable television, those differences are not now relevant in view of the much more significant similarities.

Suppose that the Boulder City Council perceived a need for more diversity and better quality in the newspapers available within that community. Suppose further that potential competitors to the Boulder Daily Camera claimed that they could not enter the market unless the Camera were restricted geographically and prevented from any use of the streets and sidewalks to distribute its paper in two-thirds of the City. I cannot imagine that any judge in the United States would not strike down such a restriction.

Yet, the City Council has persuaded itself that cable television is a "natural monopoly" on no better evidence than the assertion of other companies, including BCC, that they are financially unable to enter the city in competition with the plaintiff. It is of such common knowledge that judicial notice may be taken of the fact that increasing costs have caused the decline and fall of many publishing companies. Does the economic reality of one-newspaper cities justify governmental regulation of that business? Of course not. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974). Why should it then justify the creation of side-by-side cable monopolies by governmental fiat, thereby foreclosing even the possibility of competition in communications within the prescribed areas?

The record in this case is that "competition on the poles" is possible, and it is important to recognize that the plaintiff does not claim exclusivity in the market. It now has less than one-third of the City and it recognizes the right of the City Council to grant new permits to all comers creating direct competition in all of the City. CCC is not in place everywhere and to expand it must do all that a competitor must do in achieving growth and persuading customers to purchase its nonessential services. The City's policies severely inhibit the possibility of naturally-occurring competition. With the costs of satellite receivers rapidly going down, CCC may soon even be competing with private individuals who decide to invest in such equipment, in the same manner as private persons now invest in video tape recorders.

The City vigorously contends that the plaintiff has nothing more than a revocable license to use the public ways to convey its product and that what can be revoked in its entirety can be revoked partially. As I said in my earlier opinion, assuming that the City could revoke the license without cause, it does not follow that the City may revoke for an unlawful purpose. Although there certainly remain many questions about what may and may not be regulated by a municipality in the cable television area, the plaintiff has raised very serious concerns which are a "fair ground for litigation and thus for more deliberate investigation." *Continental Oil, supra.* Whatever may be the final characterization of the property right created by the revocable permit granted in 1964, it is a right which is enhanced by its First Amendment character, and it is a right which cannot be revoked for anticompetitive reasons without a more substantial showing of legitimate governmental involvement requiring immunity from the prohibitions of the Sherman Act. It is, therefore, more than a mere license subject to a whimsical withdrawal.

I have not considered at any length the other claims of the plaintiff in the case: the claim of a denial of equal protection, the claim of inverse condemnation, or the question of whether there is a constitutional infringement of contractual or property rights. By not commenting upon them at this juncture, I do not mean to suggest anything with regard to their merit one way or the other. I have simply found that the issues raised by the claims which were discussed are substantial enough to justify an injunction, considering the conclusions I reached in balancing the interests which may be harmed.

This memorandum opinion shall serve as an amplification of the reasons supporting the order of preliminary injunction which I entered on August 25, 1980, and it is now

ORDERED that this memorandum opinion shall be submitted to the Tenth Circuit Court of Appeals as a part of the record in this case.